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The Office of Information Practices (OIP) is authorized to issue this advisory opinion under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS.

OPINION

Requester: Department of Transportation
Agency: Department of Transportation
Date: November 3, 2010
Subject: Privilege Created under 23 U.S.C. § 409 (U RFO-G 10-5)

REQUEST FOR OPINION

The Department of Transportation (DOT) seeks an advisory opinion on whether it is required to disclose accident data for a certain location in response to a request made under the UIPA, where the record requester is engaged in a court proceeding against a county involving an accident at that location.[1]

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[1] Requester specifically asked for reconsideration of OIP Opinion Letter Number 05-06, in which OIP was asked to opine on disclosure of this type of information in a non-litigation context. Because the question DOT raises here presents a distinct factual situation, i.e., disclosure in a litigation context, OIP addresses DOT's request without reconsidering that opinion. We note, however, that, given an appropriate factual basis to support it, the legal analysis provided in this opinion could arguably be extended to allow withholding of accident data under the discovery privilege created by 23 U.S.C. § 409 even when a request is not directly related to a specific ongoing or prospective litigation, such as the request addressed in Opinion Letter Number 05-06. DOT did not there specifically argue that disclosure in a non-litigation context would nonetheless pertain to the defense of an action to which the State or a county might be a party, i.e., that the compiled accident data protected by § 409 is inherently related to the government's defense of actions for damages, and thus should be withheld, nor did DOT provide factual background to support such an argument. See Haw. Rev. Stat. § 92F-13(2) and -13(3). Thus, that possibility was not addressed by OIP in Opinion Letter Number 05-06. DOT may present such argument

Unless otherwise indicated, this opinion is based solely upon the facts presented in DOT's letter to OIP dated August 7, 2009, and attached materials.

QUESTION(S) PRESENTED

Whether DOT may, in response to a UIPA request, withhold traffic accident data from the requester, who is in litigation with a county, based upon the discovery and evidentiary privilege established by federal law under section 409 of Title 23 of the United States Code (§ 409).

BRIEF ANSWER(S)

Yes. Where the State or a county is or may be a party to a judicial action, government data that pertains to the defense of that action may be withheld from the requester under section 92F-13(2), HRS, where it falls within the privilege created under § 409. Thus, to the extent that data was actually compiled or collected by DOT for purposes of a federal program identified in § 409 to which the privilege would apply, DOT may withhold the traffic accident data from the requester.

FACTS

DOT received a request from a law firm for various records, including records evidencing traffic accidents that occurred on Pulehu Road and Hansen Road on the island of Maui (the Accident Data). DOT determined that the only records it maintains responsive to the request contained "accident" information that it believes is protected by 23 U.S.C. § 409. DOT was subsequently informed by a deputy corporation counsel for the County of Maui that the requester law firm represented plaintiffs in a civil suit filed against the County involving an accident that occurred at the intersection of Hansen Road and Pulehu Road. The County requested that DOT not disclose accident history information, asserting that plaintiffs were improperly seeking discovery for their lawsuit through this UIPA request in contravention of 23

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at a later date, preferably where it has before it a request made for accident data in a non-litigation context, and OIP will reconsider Opinion Letter Number 05-06 at such time. See generally OIP Op. Ltr. No. 95-17 at 3-4 (record subject to discovery privilege created by statute may be withheld from general public under HRS § 92F-13(4) (reconsidering, in part, OIP Op. Ltr. No. 95-5); OIP Op. Ltr. No. 94-11 at 12-13 (legislative history to frustration exception, HRS § 92F-13(3), lists as example information that is expressly made nondisclosable or confidential under federal or state law or protected by judicial rule); OIP Op. Ltr. No. 95-16 at 11-12.

U.S.C. § 409. DOT did not provide any records to the requester, and sought this opinion from OIP.[2]

DOT did not specifically identify the information or records it maintains that are responsive to the request. Accordingly, this opinion provides general guidance regarding disclosure of the Accident Data, and DOT may if desired seek further guidance as to disclosure of specific records consistent with this opinion.

DISCUSSION

Congress created the Highway Safety Improvement Program "to achieve a significant reduction in traffic fatalities and serious injuries on public roads." 23 U.S.C. § 148. That program provides states with funding to carry out projects or

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[2] DOT provided an Acknowledgment to Requester, which is provided for under section 2-71-13, Hawaii Administrative Rules (HAR), for any of the extenuating circumstances listed in that section. The existing circumstances DOT cited were that: (1) DOT needed to consult with OIP to determine whether the record is exempt from disclosure under the UIPA; and (2) DOT required additional time to respond to the request in order to avoid an unreasonable interference with its statutory duties and functions.

As we informed DOT, consultation with OIP is not an "extenuating circumstance" under section 2-71-15, HAR, which, if one exists, provides the agency up to twenty business days to provide the requester with the requisite notice regarding disclosure under section 2-71-14, HAR. Under section 2-71-15(a)(1), HAR, an extenuating circumstance exists if the "agency must consult with another person to determine whether the record is exempt from disclosure under chapter 92F, HRS[.]" Because section 2-71-15(a)(1), HAR, is not meant to extend the time for response for the purposes of seeking **legal** guidance, it does not apply where an agency is consulting with OIP and will usually not apply where an agency is consulting with its legal counsel. Instead, this section is meant to allow the agency time to consult with specific employees in a different department or division or who are otherwise not immediately available, who may possess **factual** details about the record that may be necessary to determine whether an exception to disclosure applies; or to consult with a third party who similarly may possess relevant **factual** information, such as where the agency is considering the propriety of withholding certain business or financial information concerning a third party. See Impact Statement for Proposed Rules of the Office of Information Practices on Agency Procedures and Fees for Processing Government Record Requests at 23-24.

If an agency wishes to consult with OIP, it has two options. First, it may seek general guidance, which OIP is usually able to provide within that same day. Second, it may seek a formal opinion, but must still provide notice to the requester within the regular timeframes provided by OIP's administrative rules. Thus, if the agency reasonably believes that withholding is proper, the proper procedure is to deny the request under the UIPA exception it believes applies, and to provide its notice to requester in accordance with the appropriate timeframe under the rules.

strategies to eliminate safety hazards, in particular to address the most dangerous sections of their roads. Id. To be eligible for funds, a state must, among other things, identify and rank hazardous road locations based upon crash data. Id.

§ 409 of Title 23 of the United States Code creates a discovery and evidentiary privilege for records and data compiled or collected for purposes of the Highway Safety Improvement Program under § 148 and other federal programs under § 130 and § 144 of Title 23.[3] § 409 reads in full as follows:

> § 409 Discovery and admission as evidence of certain reports and surveys
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> Notwithstanding any other provision of law, **reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions**, or railway-highway crossings, **pursuant to sections** 130, 144, and **148** of this title [23 USCS §§ 130, 144, and 148] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds **shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data**.

23 U.S.C. § 409 (emphasis added).

Congress adopted § 409 to address reluctance by states to compile and provide this type of data to the federal government under various federal statutes because of liability concerns. See Pierce County, Washington v. Guilen, 537 U.S. 129, 133 (2003) (discussing protection of § 409 in context of 23 U.S.C. § 152).[4] In Guilen, a plaintiff sought information about accidents at the intersection at which his wife had died in an automobile accident. An issue raised was whether this information must be disclosed under the State of Washington's Public Disclosure Act (PDA). The relevant portion of the PDA provided that where a person is denied access to a public record and an appeal is made to the court, the agency has the

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[3] OIP presumes that the Accident Data at issue relates to § 148, because § 130 concerns the federal railway-highway crossings program and § 144 concerns the federal highway bridge program.

[4] § 409 was amended in 2005 to substitute § 148 for § 152.

burden to establish that its withholding "'is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.'" Id. at 137 n.2.

On appeal, the United States Supreme Court ruled on the question of whether § 409 is a proper exercise of Congress' powers under the Spending, Commerce, and Necessary and Proper Clauses. In so doing, the Court first looked to the scope of the privilege created by § 409, and adopted the interpretation proposed by the United States: "§ 409 protects all reports, surveys, schedules, lists, or data actually compiled *or* collected for § 152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point 'collected' by another agency for § 152 purposes." Id. at 144.[5]

The Court found that this interpretation was reinforced by the amendment to § 409 in 1995 to add the phrase "or collected" to include protection for raw data collected for § 152 purposes. The Court continued:

> By amending the statute, Congress wished to make clear that § 152 was not intended to be an effort-free tool in litigation against state and local governments. Compare, e.g., Robertson v. Union Pacific R. Co., 954 F.2d 1433, 1435 (CA8 1992) (recognizing that § 409 was intended to "prohibit federally required record-keeping from being used as a 'tool . . . in private litigation'" (quoting Light v. New York, 149 Misc. 2d 75, 80, 560 NY.S.2d 962, 965 (Ct. Cl. 1990)), with authorities cited supra, at 3-4. However, the text of § 409 evinces no intent to make plaintiffs worse off than they would have been had § 152 funding never existed. Put differently, there is no reason to interpret § 409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to § 152, held by government agencies not involved in administering § 152, if, before § 152 was adopted, plaintiffs would have been free to obtain such information from those very agencies.

Id. at 146.

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[5] Applied to the facts there, the Court stated: "Under this interpretation, an accident report collected only for law enforcement purposes and held by the county sheriff would not be protected under § 409 in the hands of the county sheriff, even though that same report would be protected in the hands of the Public Works Department, so long as the department first obtained the report for § 152 purposes." Id.

The exception to UIPA disclosure most relevant here provides that an agency is not required to disclose records that pertain to the defense of a judicial action against a county where those records are not discoverable. Haw. Rev. Stat. § 92F-13(2). Specifically, that section provides as follows:

> § 92F-13 Government records; exceptions to general rule. This part shall not require disclosure of:
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> (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
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> ***

Haw. Rev. Stat. § 92F-13(2). OIP believes that the discovery privilege created by § 409 falls within the scope of section 92F-13(2), HRS. See generally OIP Op. Ltr. No. 95-16 at 11-12 (disclosure provisions of the UIPA not intended to permit members of the public to use the access provisions of part II of the UIPA to evade discovery protections available to an agency under pretrial discovery rules).

Under the facts presented here, DOT received a request for the Accident Data from a requester who represented parties in litigation with Maui County over an accident that occurred at the location for which the Accident Data was sought. Thus, the County was a party to a judicial action and the records requested pertained to the defense of such action. Accordingly, OIP believes that DOT could properly withhold the Accident Data under section 92F-13(2), HRS, to the extent that the data was actually compiled *or* collected for section 148 purposes and thus is non-discoverable under section 409.[6] See Guilen, 537 U.S. at 144.

OFFICE OF INFORMATION PRACTICES

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[6] We note that to the extent that Accident Data collected comes directly from traffic accident reports protected under section 291C-20, HRS, an argument may be made that certain information from those reports may also be protected from disclosure under section 92F-13(4) (exception from disclosure for among other things records protected by state statute). If DOT later seeks an OIP opinion concerning disclosure of traffic accident data in a non-litigation context, it may raise this additional argument at that time.